

No. 91-992

Supreme Court, U.S.

FILED

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In the
Supreme Court of the United States

OCTOBER TERM, 1991

NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM
Petitioner

VERSUS

THE BOARD OF COMMISSIONERS,
ORLEANS LEVEE DISTRICT
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
STATE OF LOUISIANA

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QUESTIONS PRESENTED

1.

Is petitioner's acquisition of a property right many years after the property was actually used and taken, sufficient to meet the requirements to establish a due process violation?

2.

Does the failure to raise federal constitutional issues of due process in the State courts preclude raising said issues for the first time in this Court?

3.

Does the application of Louisiana jurisprudence and R.S. 19:14 support the valuation date agreed to between respondent and the previous land owner?

4.

Is the Court below correct in accepting respondent's evidence on valuation as reasonable, and in disregarding petitioner's evidence?

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MAY IT PLEASE THE COURT:

Petitioner has misstated the facts by failing to disclose that petitioner was not the owner of the property rights taken until over fifteen (15) years after the land was used and destroyed between 1971 and 1974. During this period, with permission of the former owner, the U. S. Army Corps of Engineers dug out a canal and constructed flood control gates at Bayou Bienvenue at its juncture with the Mississippi River Gulf Outlet, known as the Bayou Bienvenue Control Structure.

In truth and fact, petitioner did not purchase the surrounding acreage flanking the canal and flood gates until June 17, 1982, and it did so with full knowledge of the existence of and purchased subject to, the canal and flood control structure.¹ Petitioner did not acquire any rights to compensation for the land taken from the former owner until 1990.

The Facts

A brief description of the property and its location is helpful in understanding what occurred over twenty (20) years ago. The land involved was a small part of a larger tract of about 725 acres. It is situated on the southern bank near the joining of the Intercoastal Waterway with the Mississippi River Gulf Outlet. The property is bisected by Bayou Bienvenue.

In 1971, the subject property and entire surrounding

¹ See A.1 item Number 5, Option to Purchase Agreement. Since the land no longer existed in 1982, it can reasonably be assumed that its former value was not included in the 1982 purchase price paid by petitioner. *Board of Commr's v. Newport*, 578 So.2d 191, 194 (4th Cir. 1991), writ den., 584 So.2d 681.

area was subject to overflow by high water driven up the Intercoastal Waterway and the Mississippi River Gulf Outlet by storms, hurricanes and east winds. In an effort to eliminate the resulting flooding, the U. S. Army Corps of Engineers determined that this could be accomplished by digging a canal and constructing flood gates at what is now known as the Bayou Bienvenue Flood Control Structure.

As the local agency responsible for flood control, in 1971 respondent contacted the property owner, Seaway Land Company, for authority to enter and commence construction.

The Board of Directors of Seaway, recognizing that the works would enhance the value of its surrounding property, on May 19, 1971, authorized its President to donate the required land to respondent.²

Pursuant to the above resolution, Seaway entered into an agreement dated May 21, 1971.³

Respondent immediately took and actually used and occupied the land by taking soil borings and performing other engineering tests needed for the project. Construction began on February 10, 1972, and was completed on September 13, 1974.

Seaway Land Company neither sought nor received compensation for the property taken in 1971. When asked why Seaway sought no compensation for its property, its former President, H. Harcourt Waters, testified that the

² See A.3, Resolution of Seaway Land Company.

³ See A.5, May 21, 1971 Agreement.

right to build the structure in 1971 was granted because it "would enhance the value of the rest of the property . . ." and added that Seaway never had any intention to accept any money for the property used, nor did it ever make or intend to make a claim for compensation.⁴ Seaway's rights to compensation were barred by Louisiana's statute of limitations in 1976.⁵

In 1982, Newport, petitioner herein, purchased the 697 remaining acres with full knowledge of and subject to the canal and the closure dam's existence, but failed to purchase the right to any compensation that may have been due Seaway. Under Louisiana law, rights to compensation for land used and destroyed are considered personal and do not transfer with a subsequent sale of the surrounding land unless expressly stated in the act of transfer. Petitioner did not acquire whatever right to compensation existed, if any, until it was recognized in the Louisiana District Court judgment dated May 25, 1990. However, no contract ever existed between petitioner and respondent pertaining thereto.

In 1984, petitioner made a claim for compensation for the Seaway land taken in 1971 and although the claim was denied, respondent agreed to institute legal proceedings to determine the parties respective rights, in and to the land taken in 1971.

Under error of fact, in 1985 a suit was initially instituted as an expropriation proceeding and respondent erroneously deposited \$146,564.00 in the registry of the

⁴ See A.7, excerpt from court transcript dated October 24, 1989, pages 31-32.

⁵ *Board of Commr's v. Newport, Ltd.*, 517 So.2d 406 (4th Cir. 1987), writ den., 521 So.2d 1151.

court on December 23, 1985 which money was withdrawn by petitioner in January, 1986. After the error was discovered, the expropriation proceeding was converted to a Declaratory Judgment proceeding on July 28, 1988 wherein, *inter alia*, respondent sought a return of the \$146,564. The second trial resulted in the judgment and decision complained of herein.⁶

On the issue of value, the court accepted the opinions of the three real estate experts who testified on behalf of respondent. Because of three (3) previous inconsistent appraisals of the identical property, the credibility of petitioner's expert was totally destroyed and rendered his opinion unacceptable to the courts.

Although petitioner had two (2) trials and two (2) appeals, the record will show that petitioner never raised the federal issues now presented in its petition in Questions I, II, III, and IV. Petitioner did raise the issue presented in Question V, but only in its final application for a rehearing and to the Louisiana Supreme Court for Writs of Certiorari and Review, both of which applications were denied without written reasons.

STATEMENT OF THE CASE

After the first trial the district court dismissed petitioner's reconventional demand for additional money on the grounds that 1) it had no right of action because it did not own Seaway Land Company's right to compensation for the 1971 taking, and 2) whatever right Seaway had to compensation, prescribed and was barred by the statute of limitations.

On the first appeal, the Louisiana Fourth Circuit

⁶ See A.9, Supplemental and Amending Petition For Declaratory Judgment.

Court of Appeal remanded to the district court for further proceedings and to determine whether the right to compensation, if any, was owned by Seaway or petitioner Newport.

After the second trial, on May 25, 1990, the District Court, *inter alia*, held that the failure of the Seaway stockholders to participate after being joined in the Declaratory proceedings constituted an admission that the second attempt at transfer by Seaway's liquidator in 1986, transferred whatever latent, inchoate rights Seaway may have had for compensation unto petitioner, but dismissed its claim on prescriptive grounds.

On the second appeal, in which respondent sought a return of the \$146,564 erroneously paid petitioner, the Louisiana Fourth Circuit Court of Appeal found that Newport, petitioner herein, now owned Seaway's right to compensation. It further fixed the land valuation date to be 1971, in accordance with the written contract between respondent and the owner, Seaway Land Company.

The court also held that respondent submitted sufficient evidence that the reasonable fee value of the property and severance damages sustained in 1971 equaled \$146,564 and that petitioner herein had not contradicted that evidence.

Petitioner failed to raise any federal constitutional issues in the above State courts, although one issue, impairment of contract, was raised on application for rehearing and to the Louisiana Supreme Court for Writs of Certiorari and Review. Both of said applications were denied.

SUMMARY OF ARGUMENT

Petitioner's after acquired title of a property right fails to meet the required interest needed to establish a due process violation.

Petitioner fails to meet the requirement that it was deprived of a property interest without due process in that it purchased the property subject to the existing channel and flood control gates that used and destroyed the property at issue.

Petitioner failed to raise federal constitutional issues in the State courts and this Court is without authority to review these issues here for the first time.

No contractual relationship ever existed between petitioner and respondent.

Alternatively, the written contract between respondent and the former land owner clearly established the year 1971 as the date of valuation of the property used and destroyed.

The value of the property was adequately proved by respondent and was not reasonably contradicted by petitioner.

1

ARGUMENT

I.

Petitioner Had No Property Interest

To establish a due process violation, petitioner must first show that it had a property interest at the time the violation occurred and that it was deprived of that interest without due process of law. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

Property rights are not created by the Constitution, but stem from an independent source such as state law. Under Louisiana law, the right to compensation for a non-judicial taking of property is a right personal to the owner of the property at the time the property is taken. It does not pass with a transfer of the land and can be conveyed only by express transfer, assignment or subrogation. *Gumble v. New Orleans Terminal Co.*, 197 La. 439, 1 So.2d 686 (1941); *Brooks v. NOPSI*, 370 So.2d 686 (4th Cir. 1979), writ den., 373 So.2d 512.

The facts show that in 1971 with the full knowledge and written consent of the owner, Seaway Land Company, respondent, through the U. S. Army Corps of Engineers, began construction of a channel, closure dam and flood gates in the area of the juncture of Bayou Bienvenue and the Mississippi River Gulf Outlet in eastern New Orleans. Construction was completed in 1974 and is known as the Bayou Bienvenue Control Structure.

On June 17, 1982, Newport, petitioner herein, purchased the surrounding property from Seaway, but did not acquire any right to compensation that Seaway may have

had for the land used and destroyed in the 1971-74 construction of the canal and flood gates. This right was not acquired until petitioner's purported 1986 acquisition was validated by the judgment of the district court rendered on May 25, 1990. *Gumble v. New Orleans* and *Brooks v. NOP-SI, supra*.

Since petitioner had no interest in the claim for compensation either in 1971 when the violation allegedly occurred or in 1985 when expropriation was erroneously filed, petitioner could not be deprived of due process. *Paul v. Davis, supra*; *Reimer v. Smith*, 663 F.2d 1316 (5th Cir. 1981).

Even if the right to compensation for the 1971 taking was acquired by petitioner with its 1982 purchase, which is denied, petitioner would be estopped because the property was purchased subject to the existing channel and flood gate structure, and petitioner acquired no property interest from which it could be deprived.

II.

This Court Will Not Decide Federal Constitutional Issues Not Raised In the State Courts

Petitioner, for the first time in its Petition for Writs to this Court, raises federal constitutional issues in Questions I, II, III and IV of its petition. Petitioner now for the first time seeks to call into question the constitutionality of Louisiana R. S. 19:14 and other state law that was never the subject of discussion in the Louisiana state courts.

Jurisdiction under 28 U.S.C.A. § 1257 requires that a federal question must be "specially set up or claimed" in reference to the constitutional validity of a state statute. This must first occur in the state courts, not in the petition for writs to the U. S. Supreme Court. The court in *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) stated the rule for jurisdiction under 28 U.S.C.A. § 1257:

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

What is required to meet the "setting up" criteria is found in *F.G. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 17 S.Ct. 709, 41 L.Ed 1149 (1897), at p. 711:

"The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare: and, unless he does so declare "specially" (that is, unmistakably), this court is without authority to re-examine the final judgment of the state court."

It is therefore submitted that, because the issues found in Questions I, II, III and IV of petitioner's petition were not "specially set up" in the State courts, jurisdiction as to these questions should be denied.

III.**The Contract Provided For Using
The Same Date of Valuation as R.S. 19:14**

Only Question V was presented by petitioner in its Application for Rehearing to the Louisiana Fourth Circuit Court of Appeal, and in its Application for Review to the Louisiana Supreme Court. Both applications were denied without reasons.

Question V contains petitioner's claim that Louisiana R.S. 19:14 unconstitutionally impaired the obligations of the contract between the parties. Respondent answers that no contractual relationship ever existed between petitioner and respondent.

The only contractual relationship in existence concerning the 1971 construction was between respondent and Seaway Land Company as evidenced by that certain agreement dated May 21, 1971.

Seaway Land Company was liquidated and dissolved on June 1, 1983, and the 1971 contract was never assigned to anyone, including petitioner, previous to said dissolution.

However, even if a contractual relationship existed, which is denied, the law complained of, R.S. 19:14, did not alter the terms of the 1971 contract. To the contrary, both the law and the contract provide for the same date of valuation.

R.S. 19:14 (non-judicial taking) provides that just compensation is to be determined as of the time of the actual use of the property taken, in the same manner as if a petition for expropriation had been filed.

The May 21, 1971, contract between Seaway and respondent clearly provides that the value of the land to be acquired shall not be considered either depreciated or enhanced by any construction, dredging or deposit of spoils performed by the United States of America with "the value of such lands to be considered as remaining as it is at present...".⁷ "Present" can only mean May 21, 1971.

In *A. K. Roy, Inc. v. Board of Commissioners for Pontchartrain Levee District*, 238 La. 926, 117 So.2d 60 (1960), the Supreme Court considered this identical issue when the Levee District took certain property of the plaintiff in March, 1949. Although plaintiff knew about the taking, it failed to assert its rights until it sued nine (9) years later and a formal expropriation suit was filed in March, 1958, in response to plaintiff's suit.⁸

The Louisiana Supreme Court held that where a property owner, with full knowledge that its property has been taken for public purposes (such as Seaway Land Company here), stands by without resistance or complaint, the owner shall be restricted to a claim for value and damages, determined as of the date of the taking and not as of the date of its lawful expropriation. 117 So.2d 60, 63.

The date of the taking and the date the landowner acquired knowledge of the taking is the sole criteria in determining time of valuation under R.S. 19:14 circumstances.⁹

⁷ See A.5, May 21, 1971 Agreement.

⁸ In the instant matter, the landowner testified that no attempt was made to file a claim for the reason that Seaway considered the property taken to be a donation. See A.7.

⁹ R.S. 19:14 was not enacted until 1976 and is not applicable to this 1971 taking. Therefore, the present facts are governed by the jurisprudence stated above in *A. K. Roy v. Board of Commr's*.

Chenevert v. La. State Dept. Hwys., 345 So.2d 960 (4th Cir. 1977), writ den., 349 So.2d 325; *Reddel v. La. State Dept. Hwys.*, 340 So.2d 1010 (4th Cir. 1976); *Cruell v. Jefferson Parish*, 216 So.2d 604 (4th Cir. 1968), writ ref., 219 So.2d 175.

Notwithstanding the jurisprudence cited above, the contract between the respondent and landowner, Seaway, provided that the value of the land was to be considered as it existed "at present." Because "present" is May 21, 1971, the date the contract was signed, it is difficult for this writer to conceive that "present" means 1985 or any other year other than 1971.

Agreements have the effect of law upon the parties and the courts are bound to give legal effect to such contracts according to the true intent of the parties.¹⁰

It is submitted that Louisiana law and R.S. 19:14 merely support the date of valuation agreed upon by the parties to the contract. There exists no unconstitutional impairment of obligations as alleged by petitioner.

IV.

Petitioner Failed to Contradict The Reasonable Values Established By The State

Petitioner purchased the surrounding property for seventeen (\$0.17) cents per square foot in 1982. Respondent produced three (3) qualified appraisers, Messrs. Tessier,

¹⁰ *Pendleton v. Shell Oil Co.*, 408 So.2d 1341 (Sup.Ct. 1982); *LaCivCo Article 1945 et seq.*; *G O Enterprises, Inc. v. Mid Louisiana Gas Co.*, 444 So.2d 1279 (4th Cir. 1984), writ den., 446 So.2d 318.

Cass and Egan, who appraised the property's value eleven (11) years earlier, in 1971, from seven (\$0.07) to ten (\$0.10) cents per square foot. The State court used the higher value of ten (\$0.10) cents per square foot, which is more than reasonable when considering that eleven (11) years later, it was purchased by petitioner for only seventeen (\$0.17) cents per square foot.

There can be no question that petitioner failed to reasonably contradict the valuation submitted by respondent. Petitioner's evidence on value was so incredulous and discredited as to be beyond belief.

It was discovered that petitioner's expert, Richard Brewster, had appraised the subject property on four (4) separate occasions for three (3) different entities within a thirty-two (32) month period, with the following fluctuations in value:

<u>Date of Appraisal</u>	<u>Appraised Value</u>
February 4, 1985	\$0.93 sq. ft.
August 4, 1986 (this litigation)	\$1.59 sq. ft.
August 26, 1986 (this litigation)	\$0.46 sq. ft.
December 8, 1987	\$0.52 sq. ft.

Because the actual purchase price of the property established in 1982 between a willing buyer and a willing seller in an arm's length transaction was \$0.17 sq. foot, the State courts wisely chose to disregard petitioner's evidence of appraised value as inconsistent and not worthy of belief.

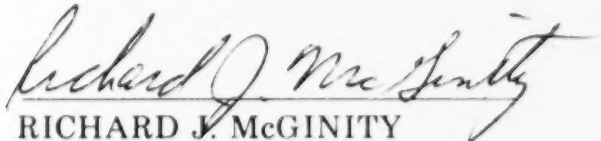
CONCLUSION

Petitioner has neither law or equity on its side. The channel had already been dug and the flood control structure was already in place eleven (11) years before petitioner purchased the surrounding property from Seaway, subject to the flood control structure's existence.

If there exists one absolute, it is that petitioner did not pay Seaway for land that did not exist at the time it purchased the surrounding property and that all land used and destroyed by the 1971 construction was fully discounted in the purchase price. It therefore had no interest to be deprived of.

Petitioner has had its day in court many times over and its applications for review by this Honorable Court should be denied.

Respectfully Submitted:



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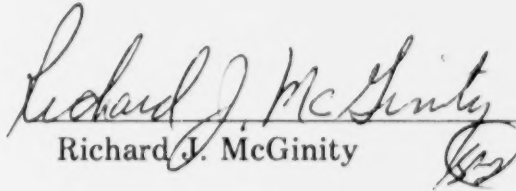
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the above and foregoing has been served upon counsel for all parties by depositing three copies of same in the U. S. Mail, postage prepaid, at the time of filing, addressed to his address of record.


Richard J. McGinity

APPENDIX A

OPTION TO PURCHASE AGREEMENT

Servitudes and Royalty Interests

- 1) Right of way granted to New Orleans Public Service, Inc., for the purpose of construction and maintenance of high-power transmission lines across the Property dated August 3, 1959, and recorded in Orleans Parish, Louisiana, in COB 630 at Folio 389.
- 2) Royalty Transfer and Conveyance by act passed before A. Charles Mulla, Notary Public, on November 14, 1972, and recorded in Mineral Lease Office Book No. 32, Folio 31, and in Conveyance Office Book 115 at Folio 544 for the Parish of St. Bernard and in the Conveyance Office for the Parish of Orleans in COB 713E at Folio 74 to 76.
- 3) Sale to State of Louisiana, Department of Highways, of land for bridge and grant of servitude for construction recorded in Orleans Parish, Louisiana, in COB 673A at Folio 92.
- 4) Grant to Board of Commissioners of Port of New Orleans for deposit of spoils recorded in Orleans Parish, Louisiana, in COB 723A at Folio 123.
- 5) Donation of Servitude to the Board of Levee Commissioners of the Orleans Levee District for the purpose of constructing the Bayou Bienvenue Control Structure recorded in Orleans Parish, Louisiana, in COB ____ at Folio ____.

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- 6) Donation of Servitude dated June 1, 1976, to the Board of Levee Commissioners of the Orleans Levee District for the purpose of construction and maintenance of a levee recorded in Orleans Parish, Louisiana, in COB 738G at Folio 141.

APPENDIX B

New Orleans, Louisiana

May 19, 1971.

Due notice thereof having been given, a meeting of the Board of Directors of Seaway Land Company was held at the office of the corporation, 603 Whitney Building, New Orleans, La.

Present: Arthur C. Waters,

 Mrs. Carroll S. Schanzer,

 Robert A. Armstrong,

 Mrs. Harriette W. Miles.

Mr. Arthur C. Waters explained to the meeting that the Board of Levee Commissioners of the Orleans Levee District had requested that this corporation grant to said Board, and/or its assigns, the right to enter upon a portion of the property owned by this corporation for the purpose of constructing the Bayou Bienvenue Control Structure. He further explained to the meeting that it was to the best interests of this corporation that it cooperate with said Board in said construction work, inasmuch as such work will enhance the value of the remaining property owned by this corporation.

A full discussion of the matter was had, and upon motion of Mrs. Carroll S. Schanzer, seconded by Mrs. Harriette W. Miles, it was unanimously resolved that the President of this Corporation, Mr. Arthur C. Waters, be authorized and empowered to transfer to the Board of

Levee Commissioners of the Orleans Levee District, without consideration, the following lands in, and on which said Board shall have the right of entry:

All of those areas in Township 12 South, Range 13 East, in Orleans Parish, Louisiana, shown on U. S. Army Engineer District, New Orleans, Corps of Engineers, Map File No. H-4-25131, Drawings 1 through 4, entitled "Bayou Bienvenue Control Structure," colored red for fee simple, green for perpetual channel, and blue for temporary spoil areas, as a means of easy identification, attached hereto and made part hereof.

Said President was further authorized and empowered to sign any and all documents necessary and proper to carry out the purposes of this resolution.

There being no further business, the meeting adjourned.

/s/ Carroll S. Schanzer

Secretary.

CARROLL S. SCHANZER

CERTIFICATE

I certify that the above and foregoing is a true and correct copy of the minutes of a meeting of the Board of Directors of Seaway Land Company, held at the office of the corporation on May 19, 1971, at which meeting a quorum was present.

/s/ Carroll S. Schanzer

Secretary.

CARROLL S. SCHANZER

APPENDIX C

TO: *BOARD OF LEVEE COMMISSIONERS OF
THE ORLEANS LEVEE DISTRICT*

The undersigned hereby grant to the Board of Levee Commissioners of the Orleans Levee District, and/or its assigns, the right to immediately enter upon the hereinafter described property for the purpose of constructing the Bayou Bienvenue Control Structure, a feature of the Lake Pontchartrain and Vicinity, Louisiana Project.

The lands in, on and to which this right of entry applies are described as follows:

Being all of those areas in Township 12 South, Range 13 East, in Orleans Parish, Louisiana, shown on U. S. Army Engineer District, New Orleans, Corps of Engineers, Map File No. H-4-25131, Drawings 1 through 4, entitled "Bayou Bienvenue Control Structure," colored red for fee simple, green for perpetual channel, and blue for temporary spoil areas, as a means of easy identification, attached hereto and made a part hereof.

The right of entry herein granted is transferable to the United States of America for the purpose of construction of the aforesaid Bayou Bienvenue Control Structure.

It is agreed that negotiations will be entered into promptly for the acquisition by the Board of Levee Commissioners of the Orleans Levee District of fee simple for the control structure site, permanent easements for the channel and a temporary area for placement of spoils, in the lands upon which this right of entry is granted under mutually satisfactory terms, or, if mutually satisfactory

terms cannot be agreed upon, that the Board of Levee Commissioners of the Orleans Levee District will take steps to acquire the interest by condemnation procedure.

It is further agreed that the value of the lands to be acquired by the Board of Levee Commissioners of the Orleans Levee District shall not be considered either depreciated or enhanced by any construction, dredging or deposit of spoils performed by the United States of America, or its assigns, or by related work by the Board of Levee Commissioners of the Orleans Levee District, the value of such lands to be considered as remaining as it is at present and to be arrived at as though no construction, dredging or deposit of spoils or other related works had taken place.

This right of entry shall remain in full force and effect during the construction of the Bayou Bienvenue Control Structure, but shall not exceed a period of three (3) years from the date construction begins or the lands herein described have been acquired by the Board of Levee Commissioners of the Orleans Levee District.

Date of instrument: May 21, 1971.

Seaway Land Company, Inc.

By /s/ Arthur C. Waters

Pres.

APPENDIX D

MAY, I THINK IT'S DATED MAY 21, 1971?

A WELL, YES. YOU SHOWED ME THAT. I THINK I HAVE A COPY SOMEWHERE. BUT IT'S HIS SIGNATURE. YOU ASKED ME IF IT'S HIS SIGNATURE. YES, IT IS.

BY MR. WILSON: THERE'S NO QUESTION OF AUTHENTICITY. I DON'T KNOW WE HAVE TO HAVE THIS WITNESS IDENTIFYING DOCUMENTS.

BY THE COURT: OKAY, WE DON'T NEED THAT.

BY MR. MCGINITY:

Q IN FACT, MR. WATERS, AFTER MAY OF 1971, DID YOU OR DO YOU KNOW OF ANYONE CONNECTED WITH SEAWAY THAT ATTEMPTED OR CONTACTED THE LEVEE BOARD OR ANYONE ELSE TO BE PAID MONEY FOR THE CONSTRUCTION OF THIS CONTROL STRUCTURE AND THE BUILDING OF THE CHANNEL?

A NO. WAIT, YOU'RE ASKING IF ANYBODY CONNECTED WITH SEAWAY MADE ANY EFFORT TO EFFECT THE SALE, RECEIVE SOME SORT OF COMPENSATION?

Q YES.

A I WOULD SAY DEFINITELY NO AND I THINK I WOULD HAVE KNOWN BECAUSE I HAD THE CHECKBOOK IN MY FATHER'S OFFICE.

Q IS IT TRUE THAT SEAWAY CONSIDERED THE CONTROL STRUCTURE AND THE CHANNEL PROPERTY TO BE IN EFFECT A DONATION?

BY MR. WILSON: I OBJECT. WE HAVE A WRITTEN DOCUMENT IN EVIDENCE HERE AND WHAT THIS WITNESS MAY OR MAY NOT CONSIDER TO HAVE HAPPENED IS ENTIRELY SUSPECT.

BY THE COURT: SUSTAINED.

BY MR. MCGINITY: YOUR HONOR, I AM NOT QUESTIONING THE WITNESS AS TO WHAT THE DOCUMENT SAYS. I AM QUESTIONING THE WITNESS AS TO WHAT WAS THE INTENT. I'M NOT TRYING TO VARY THE TERMS. I KNOW WHAT THE INSTRUMENT SAYS BUT THEY CONSIDERED IT TO BE A DONATAION. I HAVE A RIGHT TO ASK THE WITNESS THAT THEY CONSIDERED IT TO BE A DONATION NO MATTER WHAT THEY SIGNED.

BY MR. WILSON: YOUR HONOR, THE PAROLE EVIDENCE RULE, HE DOESN'T

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APPENDIX E

**CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS**

STATE OF LOUISIANA

NO. 85-21837 DIVISION " J " DOCKET NO. 4
SECTION " S "

**BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT**

VS

**NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM**

FILED: _____
DEPUTY CLERK

**SUPPLEMENTAL AND AMENDING
PETITION FOR DECLARATORY JUDGMENT**

The supplemental and amending petition of The Board of Commissioners of the Orleans Levee District, a political subdivision of the State of Louisiana, respectfully represents that it desires to supplement and amend its original petition in the following respects:

1. By amending paragraphs I through VIII to read as follows:

I.

The following are named defendants in this pro-

ceeding being all the known stockholders of Seaway Land Company, a Louisiana corporation that was liquidated and dissolved on June 1, 1983:

1. Mrs. Virginia Schanzer de Laoreal
 2. Mrs. Virginia Schanzer de Laoreal, Custodian for Jean-Paul de Laoreal
 3. Mrs. Virginia Schanzer de Laoreal, Trustee for Jean-Paul de Laoreal
 4. Mrs. Virginia Schanzer de Laoreal, Custodian for Michele de Laoreal
 5. Mrs. Virginia Schanzer de Laoreal, Trustee for Michele de Laoreal
 6. Mrs. Charlotte Waters Schanzer
 7. Miss Charlotte W. Schanzer
 8. H. Harcourt Waters
 9. Henry Harcourt Waters, II, Trustee for Isabel Parham Waters, Sanders and Peter Breazeal Waters
 10. Dr. Henry H. W. Miles
 11. Dr. Oliver B. Miles
- all of the aforesaid being residents of the Parish of Orleans, State of Louisiana;
12. Mrs. Leigh Frith Galey

13. W. Porcher Miles

14. Mr. A. Beirne Miles

all of the aforesaid being residents of the Parish of Jefferson, State of Louisiana;

15. Mr. James S. Miles, domiciled in the Parish of Lafayette, State of Louisiana.

The following defendants are non-residents of Louisiana, however, personal jurisdiction of the court is founded on the Louisiana Long Arm Statute (R.S. 13:3201 *et seq.*):

16. Mrs. Sydney Schanzer Cambon, Baltimore, Maryland

17. Mrs. Sydney Schanzer Garcia, Baltimore, Maryland

18. Mrs. Sidney Schanzer Cambon, Custodian for Carroll Smithers Cambon, Baltimore, Maryland

19. Mrs. Sydney Schanzer Garcia, Trustee for Carroll Cambon, Baltimore, Maryland

20. Mrs. Sydney Schanzer Cambon, Custodian for Etienne Dana Cambon, IV, Baltimore, Maryland

21. Mrs. Sidney Schanzer Garcia, Trustee for Etienne Cambon, Baltimore, Maryland

22. Mrs. Virginia Smithers Frith, Pass Christian, Mississippi

23. Mrs. Elinor Armstrong Sheppard, Sudbury, Ontario, Canada

24. Mr. Calvin L. Blair, Toronto, Ontario, Canada

25. Mrs. Elizabeth Armstrong Stratton, Thornhill, Ontario, Canada

26. Mrs. May M. Elmore, Spartanburg, South Carolina

27. Mrs. Nancy M. White, Union, West Virginia

28. Mrs. Martha M. Stibbs, Seattle, Washington

29. Mr. Robert A. Armstrong, Toronto, Ontario, Canada.

Also named defendants herein are:

30. Newport Limited and

31. Newport Enterprises, partnerships in commendam whose sole general partners are C. Bronson Doyle and Donald W. Doyle, Jr., domiciled in the Parish of Orleans, State of Louisiana;

32. Seaway Land Company, a Louisiana corporation duly liquidated and dissolved on June 1, 1983 through its liquidator, H. Harcourt Waters, domiciled in this Parish and State.

II.

On May 21, 1971, Seaway Land Company (SEAWAY) granted to petitioner (BOARD) a right-of-entry upon approximately 25 acres of its land for the purpose of building the Bayou Bienvenue Control Structure (STRUCTURE). (Exhibit A-1).

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III.

Pursuant to this right-of-entry, petitioner took immediate possession of the property and construction was actually commenced on February 10, 1972 and was completed on September 13, 1974.

IV.

On November 16, 1979, SEAWAY granted an Option to Purchase certain land and mineral rights. (Exhibit A-2). At a special meeting held on December 12, 1979, SEAWAY's stockholders adopted a resolution authorizing its President, H. Harcourt Waters, to execute any and all agreements in furtherance of the "Option to Purchase Agreement." (Exhibit B).

V.

Pursuant to the aforesaid Option, on February 17, 1982, SEAWAY's Board of Directors adopted a resolution authorizing its President, to transfer title to lands owned by SEAWAY. (Exhibit C).

VI.

In accordance with the aforesaid, on June 17, 1982, SEAWAY sold the approximately 1000 acre tract of land, which included the said 25 acres in question, to Newport Limited (NEWPORT), defendant herein. (Exhibit D).

VII.

SEAWAY neither demanded nor was paid any compensation for the taking in 1971 and the 1982 Act of Sale was silent as to the transfer of SEAWAY's rights to

compensation as may have existed at that time.

VIII.

Under the mistaken belief that NEWPORT had validly acquired from SEAWAY whatever rights to compensation SEAWAY may have owned as a result of the 1971 construction, petitioner instituted these proceedings and deposited \$146,564 in the registry of this Court on December 23, 1985.

2. By adding paragraphs IX through XVI as follows:

IX.

In January, 1986, NEWPORT withdrew the \$146,564 so deposited and on April 9, 1986, filed a reconventional demand seeking an additional \$2.1 million for the land taken from SEAWAY in 1971.

X.

On May 15, 1985, NEWPORT attempted to acquire SEAWAY's right of compensation through a purported "Act of Correction" executed by SEAWAY's President by declaring it was the "intent" of SEAWAY's stockholders to transfer their rights in the \$146,564 or \$2.1 million to NEWPORT as part of the 1982 sale of the land.

XI.

As subsequently held by this Court and concurred in by the Fourth Circuit Court of Appeal, the 1985 Act of Correction was void because the SEAWAY corporation was liquidated and dissolved in 1983, two years before the document was executed. A second "Act of Correction" dated

November 17, 1986, purporting to again declare the "intent" of the SEAWAY stockholders to give the money to NEWPORT is also at issue herein.

XII.

Although petitioner respectfully reserves all rights pertaining thereto, in its decision dated December 12, 1987, the Court of Appeal declared in dicta that "either Seaway or Newport is the owner of that claim [for the land taken in 1971]."

XIII.

Although petitioner denies that any compensation is due as a result of the 1971 taking, and reserves all rights pertaining thereto, a justiciable controversy exists between the BOARD, NEWPORT, and the stockholders of SEAWAY in that the aforementioned instruments fail to indicate the intent of SEAWAY and its stockholders concerning the transfer of the right to compensation arising from the 1971 taking.

XIV.

In order to determine the legal owners of the right to compensation, it is necessary to determine the "intent" of SEAWAY's stockholders to transfer those rights as alleged in the documents aforesaid.

XV.

Therefore, to avoid the danger of double litigation, and the possibility of double liability, petitioner desires and is entitled to have all parties before this court and to require them to assert their respective claims to the right of compensation contradictorily against petitioner and against each other.

Petitioner avers that the out of state resident defendants executed the sale and transacted other business in this state, and at the time in question had an interest in immovable property located in this Parish and State. Therefore, this court may exercise personal jurisdiction over said non-resident defendants in accordance with R.S. 13:3201 *et seq.*

3. By amending the prayer to read as follows:

WHEREFORE, petitioner prays that:

1. A certified copy of this petition and citation to all non-resident defendants to appear and answer this petition be prepared by the Clerk of this Court and delivered to counsel for petitioner for service on defendants in accordance with L.R.S. 13:3201 *et seq.*

2. All other defendants be cited to appear and assert their respective claims against petitioner and against each other.

3. For a declaratory judgment declaring and naming the rightful owners of the claim for compensation for the 1971 taking.

4. For a judgment in favor of petitioner and against the rightful owners decreeing that petitioner is not liable to said rightful owners for the 1971 taking of property.

5. Alternatively, for a judgment declaring the amount due the rightful owners by petitioner to be \$146,564, being the amount deposited with this court.

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Respectfully Submitted,

RICHARD J. MCGINITY

/s/ RICHARD J. McGINITY

GENERAL COUNSEL
BOARD OF COMMISSIONERS
ORLEANS LEVEE DISTRICT
Suite 100, Administration Bldg.
Lakefront Airport
New Orleans, LA 70126
(504) 246-4002

O R D E R

Let the Supplemental and Amending Petition be filed herein.

New Orleans, Louisiana, this 28th day of July, 1988.

/s/ RICHARD J. GANUCHEAU
JUDGE

PLEASE SERVE:

Newport Limited and
Newport Enterprises
through their attorneys
of record:

John M. Wilson

Julie E. Schwartz

Liskow & Lewis

50th Floor, One Shell Square
New Orleans, LA 70139-5001

Seaway Land Company
through its liquidator:

H. Harcourt Waters

2315 Chestnut Street

New Orleans, LA

Mrs. Virginia Schanzer
de Laureal

1453 Webster Street

New Orleans, LA

Mrs. Virginia Schanzer
de Laureal, Custodian for
Jean-Paul de Laureal
1453 Webster Street
New Orleans, LA

Mrs. Virginia Schanzer
de Laureal, Trustee for
Jean-Paul de Laureal
1453 Webster Street
New Orleans, LA

Mrs. Virginia Schanzer
de Laureal, Custodian for
Michele de Laureal
1453 Webster Street
New Orleans, LA

Mrs. Virginia Schanzer
de Laureal, Trustee for
Michele de Laureal
1453 Webster Street
New Orleans, LA

PLEASE SERVE (continued):

Mrs. Charlotte W. Schanzer
1228 Fourth Street
New Orleans, LA

Miss Charlotte W. Schanzer
1228 Fourth Street
New Orleans, LA

Mrs. Leigh Frith Galey
4913 Picone Street
Metairie, LA 70002

H. Harcourt Waters
2315 Chestnut Street
New Orleans, LA

Henry Harcourt Waters, II
Trustee for Isabel Parham
Waters
512 Whitney Bldg.
New Orleans, LA

Henry Harcourt Waters, II
Trustee for Sanders Breazeal
Waters
512 Whitney Bldg.
New Orleans, LA

Henry Harcourt Waters, II
Trustee for Peter Breazeal
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512 Whitney Bldg.
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Dr. Henry H. W. Miles
123 Walnut St. #305
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Dr. Oliver B. Miles
3614 Camp Street
New Orleans, LA 70115

W. Porcher Miles
202 E. Livingston Place
Metairie, LA

James S. Miles
Route 1, Box 930
Scott, LA

A. Beirne Miles
325 Atherton Drive
Metairie, LA

**PLEASE PREPARE CITATIONS FOR NON-RESIDENTS
UNDER R. S. 13:3201 *ET SEQ.*:**

Mrs. Sydney Schanzer Cambon 4204 Greenway Road Baltimore, Maryland 21218	Mrs. Sidney Schanzer Garcia 4204 Greenway Road Baltimore, Maryland 21218
Mrs. Sydney Schanzer Cambon Custodian for Carroll Smithers Cambon 4204 Greenway Road Baltimore, Maryland 21218	Mrs. Sidney Schanzer Garcia Custodian for Carroll Cambon 4204 Greenway Road Baltimore, Maryland 21218
Mrs. Sydney Schanzer Cambon Custodian for Etienne Dana Cambon, IV 4204 Greenway Road Baltimore, Maryland 21218	Mrs. Sidney Schanzer Garcia Custodian for Etienne Cambon 4204 Greenway Road Baltimore, Maryland 21218
Mrs. Virginia Smithers Frith 961 East Beach Pass Christian, MS 39571	Mrs. Elinor Armstrong Sheppard 23 Maki Avenue Sudbury, Ontario, CANADA
Calvin L. Blair c/o Robert A. Armstrong 80 Rowanwood Avenue Toronto, Ontario M4W 1Y9 CANADA	Mrs. Elizabeth Armstrong Stratton 96 John Street Thornhill, Ontario L3T 1Y4 CANADA
Mrs. May M. Elmore 1075 Partridge Road Spartanburg, SC 29301	Mrs. Nancy M. White Walnut Grove Farm Union, WV 24983
Mrs. Martha M. Stibbs 2809 W. Eaton Seattle, WA 98199	Robert A. Armstrong 80 Rowanwood Avenue Toronto, Ontario M4W 1Y9 CANADA

